IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEROME M. WENGER Defendant.	MEMORANDUM OPINION RESOLVING SENTENCING ISSUES Case No. 2:99-CR-00260 PGC

This matter is before the court for sentencing of Mr. Wenger who was convicted by a jury on a three-count indictment alleging securities fraud and undisclosed compensation on August 26, 2003. A pre-sentence report was capably prepared in this matter, indicating that the offense level was 23 and the criminal history category was I. The government raises no objections to report. Mr. Wenger raises three objections: first, that the "loss" from the offense was only $189,000, rather than the $865,551.65 calculated by the probation office; second, that no enhancement for a "special skill" or "position of trust" is appropriate; and, third, that he did not obstruct justice.

This written order will explain the court's findings of fact and conclusions of law on these issues. A draft copy of this order was provided to counsel before the sentencing hearing in order to provide an opportunity to comment on and challenge any of the findings. The court also

133

gave the parties several months to brief the issues pertaining to the court's proposed findings and conclusions.

Factual Findings

Findings Relevant to the Loss Calculation

The court has had the benefit of hearing six days of trial testimony and reviewing dozens of trial exhibits, as well as reviewing affidavits and sentencing memoranda from government and the defendant. Based on these materials, the court makes the following findings of fact.

Defendant Wenger published a newsletter known as *The Next SUPERStock*. *The Next SUPERStock* made investment recommendations to potential purchasers of very low priced stocks, commonly referred to a "penny stocks." Panworld Minerals International, Inc. ("Panworld"), a publicly-traded company headquartered in Salt Lake City, Utah, was one of Wenger's recommended stocks.

During the summer of 1994, Wenger publicized Panworld stock. In *The Next SUPERStock*, Wenger gushed, " . . . this development stage company is making significant progress on two distinct types of mining operations." He further stated, "Panworld . . . plans to follow a systematic, strategic plan designed to move the company out of development and into full and dynamic profitability." Wenger concluded the article with a recommendation, "[w]e believe there are several sound reasons for investors to consider an acquisition of PWLM [Panworld] at this time: The company is well-diversified . . . . The fact that PWLM was one of the first companies to recognize Peru as a viable mining area . . . .While PWLM's move out of the development and into profitability may take several months, the financial rewards should be substantial – for the company and investors alike."

Similarly, on June 18, 1994, Wenger touted Panworld on a radio show in a discussion with David Hesterman, another consultant to Panworld. Wenger commented, ". . . Panworld, of course, is a, one of the[ir] stocks [is] trading at book value and has a great direction to go, and that's north. I think we'll start to see a little bit more of that as more people get involved in your company."

Wenger also participated in a radio show with Bob Weeks. Wenger describes being "impressed" with Panworld four different times during the show.

Unbeknownst to Wenger's audience, Wenger was lavishly compensated for these favorable reports. Prior to the newsletters and radio shows, Wenger contracted with Panworld to provide financial public relations, consulting, and advisory services. In exchange for his services, Wenger was to receive as many as 5,500,000 shares of Panworld stock. Between February 10, 1994, and April 15, 1994, Panworld in fact issued 2,100,000 shares to Wenger. Wenger took shares of stock rather than cash because there was a significant possibility of gain "upside."

During the interviews, Wenger did not disclose he owned any shares of Panworld stock. Instead, he only briefly acknowledged that Panworld used him as a "consultant." Similarly, in his newsletter, Wenger made only the following boilerplate disclosure:

> Officers, directors, editors, writers, or employees of *The Next SUPERStock* may from time to time purchase, sell or have a position in securities of the company discussed in this report, and these positions may be increased or decreased in the future. In some cases, *The Next SUPERStock* or its employees may have a consulting arrangement with some of the companies and may provide a host of services for a fee.

Shortly after these communications indicating the audience should buy Panworld stock, Wenger managed to sell only part of his shares, actually receiving $109,764.50. During this time, 7,752,300 shares were sold to investors through LaJolla securities (a brokerage house with close ties to Wenger) at a total cost of $865,551.65. A small number of those buyers sold shares during that same period for a total return of $10,160. The total amount these shareholders lost when Panworld stock became worthless was $855,391.65. It is not clear how many of these buyers acted because they read *The Next SUPERStock* or listened to Wenger's radio shows. In addition, other shares were sold through other brokerage firms.

Wenger intended to sell all 2.1 million shares that he received from the company. The value of the stock when he received it was $355,000, broken down into three separate pieces.

Wenger first received 1 million shares on February 10, 1994. Those shares would have a value of at least $0.19, as (for example) Mr. Dyser bought shares of Pan World at $0.19 on a trade date of February 7, 1994, with a settlement date of February 14, 1994. One million shares at $0.19 per share equals $190,000. While these shares were apparently restricted shares, Wenger could have sold them all within 90 days to a year. The restriction on the stock did not significantly reduce their value and did not significantly alter the fact that Wenger intended to sell them rapidly for (at least) what they were worth when transferred to him. If Wenger's scheme had been successful, he could have made a market for the various individual transactions necessary to unload the stock without significantly depressing their price.

Wenger next received 500,000 shares on March 29, 1994. There was one sale at LaJolla on March 29, 1994, at $0.18 per share. Simple multiplication (500,000 shares x $0.18/share) generates a value of $90,000.

Wenger finally received 600,000 shares on April 15, 1994. There were two sales at LaJolla on April 15, 1994, at $0.13 and $0.12. The closing price listed on Bloomberg's for April 15, 1994, was $0.129. Taking the average of the actual sales ($0.125) and multiplying by 600,000 shares produces a value of $75,000.

Summing the three transactions ($190,000 + $90,000 + $75,000) generates an initial value of the shares Wenger received of $355,000. Dividing that value ($355,000) by the total number of share (2.1 million) produces a per share price of $0.169 – conservatively rounded downward here to $0.16.

He was able to sell the shares for prices that ranged as high as $0.19 a share. The average price that he received was $0.14 per share. He intended to obtain, at the very least, the value of the shares at the time they were provided to him. He hoped through his promotional activities to increase the value of the stocks so that he would be able to sell them for even more than they were worth when transferred to him.

Panworld stock ultimately became worthless.

Findings Relevant to the Special Skills Enhancement

Wenger has had long involvement spanning more than a decade in the penny stock market and specialized expertise about how the penny stock market operates. Indeed, he had even published a book on the subject. According to Wenger, his book – *Penny Stocks: How to Profit with Low-Priced Stocks* (co-authored with George W. Kromer, Jr.) – is a "170-page soft cover book [that] is a *must* for any investor's library. The authors have combined experience of over 25 years in researching and writing on low-priced stocks."[1] Wenger was able to negotiate

[1] *The Next SUPERStock*, Vol. 14, No. 5 (emphasis in original).

for compensation in penny stocks and sell his Panworld stocks because of his specialized knowledge about how the penny stock market operates. Wenger knows how to promote penny stocks effectively and has promoted a number of other penny stocks apart from Panworld.

To reduce the negative impact of his sales of Pan World on share price and to conceal his criminal activities, Wenger sold his shares of stock through three separate brokerage accounts, including an account in his wife's name[2] and an account maintained outside the country (specifically in Canada).[3]

Findings Relevant to the Obstruction of Justice Enhancement

1. False Financial Information. In December of 2002, as part of the Rule 20 proceeding and concomitant pre-plea investigation by the probation office, Wenger submitted a signed purported full financial disclosure statement and documentation supporting a financial profile that he was insolvent – specifically that his liabilities exceeded assets by more than $72,000. Wenger deliberately omitted, with the intent to mislead the probation office, information that had a significant financial interest in a condominium. Rita Hilsenrath Wenger (now Burks) and defendant Wenger divorced in 2000. As pat of the settlement of their divorce, defendant Wenger received a home located at 109 S. Nashville Ave., in Ventnor, New Jersey. The home was originally held in Rita Hilsenrath Wenger's name because defendant Wenger did not want assets in his name. During the divorce proceedings, defendant Wenger said that he didn't want the house held in his name and that he was going to put it in his father's name. The reason for this decision was to avoid the possibility of creditors or the government attaching the home. The

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[2] Trial Exhibit 30.

[3] Trial Exhibit 32.

home was valued at between $400,000 and $500,000. The property was sold on April 30, 2002, for $400,000. As a matter of fact, the transaction was actually conducted by defendant Wenger, but was listed as Harry Wenger in care of J. Wenger.

There is no doubt that Wenger deliberately gave false information about the condominium to the probation office. Wenger seems to suggest that he had previously transferred the property to his father, so he did not have to disclose its existence to the probation office. If this transfer was made, the court concludes it was a fraudulent transfer. In any event, however, Wenger was specifically asked to disclose to the probation office "any assets you have transferred or sold since the date of your arrest with a cost or fair market value of more than $500." His answer was "none." He signed the form attesting to the accuracy of the information in it. The information about the property was material to decisions to be made by the probation office, such as whether to order restitution and/or a fine.

2. Rule 20 Proceedings. On April 19, 1998, Wenger was charged with securities fraud in an extensive indictment filed in the Southern District of New York (#98-CR-00329). On July 26, 2000, Wenger was charged in a felony information in the Southern District of Florida (#00-CR-08094) with undisclosed compensation. Through counsel, Wenger participated in arrangements to have these charges all transferred to the District of Utah pursuant to Rule 20 of the Federal Rules of Criminal Procedure, a process that took considerable time. In addition to the transfer, Wenger obtained over three years of continuances and delays in consummating the guilty plea he had indicated he would enter. The docket sheet in this case reflects a pattern of deliberate delay – including over a dozen separate continuances spanning a three-and-a-half year period. Finally, in March 2003, he ultimately refused to enter a plea. Instead, he requested a trial

on all charges. The two matters originating outside Utah were returned to their originating courts and this matter was set for trial on August 19, 2003.

Wenger engaged in deliberate tactical manipulation in these Rule 20 discussions. Contrary to the representations he made in the Rule 20 papers, he did not intend to plead guilty but rather to delay the process of holding him accountable for the crimes charges against him. While Wenger now suggests that there were some "new" tax consequences to entering the plea that he had not anticipated, in fact he was well aware of those consequences previously.

Discussion

The Loss in this Case is Properly Calculated as $355,000

The defendant and the government both agree that the 1993 sentencing guidelines apply in this case. All references in this order are to the 1993 guidelines. The parties agree that section 2F1.1 is the applicable guideline, producing a base offense level of 6. The question of "loss" as disputed.

The government argues for a loss in excess of $800,000, arguing that all sales of Panworld stock through LaJolla are chargeable to Wenger as "relevant conduct" for his offense. The court rejects the government's position. The government has provided insufficient evidence to carry its burden of proof that Wenger knew that all of the sales of Panworld stock were part of a fraud. To the contrary, the evidence at trial suggests that Wenger certainly hoped that Panworld would be successful in his mining ventures. The government has failed to prove that Wenger had significant inside knowledge about the actual financial affairs of Panworld, in contrast to Panworld principals.

The court concludes that the appropriate loss is $355,000. Under application note 7 to the guidelines, the court is instructed to use an "intended" loss from a fraud if that is greater than an "actual" loss. Wenger does not dispute that the actual loss in this case is at least $109,000, reflecting actual sales of Panworld stock that he made. Wenger, however, clearly intended to unload not just part of his stock, but all of his stock. Therefore, the intended loss was not the stock that he actually was able to sell before the market collapsed, but the stock that he planned to sell if the market had permitted sales.

Wenger intended to sell those shares for at least as much as they were valued when he received them. The value when he received the shares was $355,000 (an average of $0.16 per share). This is an appropriate – and very conservative – loss calculation.

Wenger apparently appears to concede that at least a $0.14 share price is appropriate, since the $109,000 loss figure he uses is based on such a price. However, using this share price is too low. Wenger intended, through his manipulative activities, to keep the share price as high as possible. Indeed, when he first received shares, they were valued at $0.19 per share. It was only because he was not fully successful at his promotional activities that the price fell. Obviously, his intent was to keep the share price as high as possible while he was dumping the stock. At an absolute minimum, he hoped to stabilize the share price to permit him to sell the shares for the value that the shares had when he received them – that is, at an average of $0.16 per share for a total intended profit on the scheme of $355,000. This is an extremely conservative calculation of loss, as Wenger intended to sell the shares for more – at least $0.19 per share.

An Enhancement for Use of Special Skill is Appropriate

Wenger objects to a two-level enhancement for abuse of a position of trust and/or use of special skill pursuant to section 3B1.3. The government argues that the enhancement is proper, because Wenger occupied a position of trust as radio talk show host and a financial newsletter advisor. The government may well be correct. The court believes, however, it is far simpler to justify this enhancement for use of a "special skill."

Under this guideline, an enhancement is proper if the defendant "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense . . . ." Under application note 2, a "special skill" is defined as "a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing." The skill must be used to "make easier" the commission of the offense.[4] A skill can be "derived from experience or from self-teaching."[5]

Wenger repeatedly used a special skill to *commit* the offense. Specifically, Wenger used his great knowledge of the penny stock market, developed over many years, to obtain compensation agreements that gave him stock, to promote those stocks, and then to sell those stocks to unsuspecting members of the public so as to maximize his return. For example, Wenger was knowledgeable in how to parcel out his sales and time and stagger them to obtain maximum return. In addition, Wenger was knowledgeable in how to "make a market" in penny stocks. Entirely apart from these facts, Wenger also used his special skills to *conceal* the offense. He knew, for example. how to hide the sales that he was making by conducting trades

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[4] *United States v. Gandy*, 36 F.3d 912, 914 (10th Cir. 1994).

[5] *Id.*

through his wife and various accounts, including an account in Canada. For these two separate reasons, the enhancement is appropriate.

An Obstruction of Justice Enhancement is Appropriate

Wenger appropriately received an obstruction of justice enhancement for two separate and independent reasons. First, Wenger willfully and deliberately provided false material financial information to the probation office concerning his interest in and transfer of property in New Jersey. This false information was designed to interfere with the proper preparation of a pre-sentence report by concealing assets. Second, he engaged in willful and deliberate tactical manipulation of the Rule 20 process to delay this case. His actions stemmed not, as he now argues, from a mere change of heart about whether to enter a plea. Rather his actions were, from the outset, designed to significantly delay and impede the proper and timely handling of his case.

Wenger may have also deliberately attempted to generate a false medical rational to delay proceedings before this court by obtaining a phony medical excuse to avoid travel. In view of the three separate and independent reasons for an obstruction of justice enhancement, the court need not firmly determine whether an obstruction of justice enhancement is also appropriate on this ground.

Restitution

Restitution in this case is complicated by what appears to be a statutory "glitch." While Congress allows the court to order full and immediate restitution for title 18 offenses,[6] there is apparently no similar authorization for restitution for title 15 offenses, such as the securities violations at issue here. At most, the court has limited authority, as a condition of supervised

[6] *See* 18 U.S.C. § 3663; 18 U.S.C. § 3663A.

release following any prison term, to order restitution to victims.[7] However, since this will be several years down the road, it is unclear whether victims would actually obtain any funds.

This limited authority to impose restitution makes no sense. In cases such as this one where victims have suffered significant losses as a direct and proximate result of the defendant's securities fraud, the court believes it should have the authority to impose full and immediate restitution. In the absence of such authorization, the court declines to order deferred restitution, preferring instead to order an immediate fine.

Fine

The court is authorized to impose an immediate fine of up to $1,000,000 by statute[8] and the guideline range goes up to $1,000,000. Wenger has declined to provide accurate financial information, as is his right under the Fifth Amendment. In the absence of any information suggesting a defendant's inability to pay a fine and in light of evidence regarding Wenger's attempt to hide ownership of a valuable condominium, the court concludes that a $1,000,000 fine, due immediately, is appropriate.

CONCLUSION

For the foregoing reasons, the court finds that the offense level in this case is properly calculated as follows:

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[7] *See* 18 U.S.C. § 3563.

[8] 15 U.S.C. § 78ff (1999).

Base Offense Level	6
Loss of $355,000	9
More-than-minimal planning	2
Obstruction of Justice	2
Use of Special Skill	2
TOTAL	21

The court also concludes that a $1,000,000 fine is appropriate.

DATED this 30th day of January, 2004.

BY THE COURT:

Paul G. Cassell
United States District Judge

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United States District Court
for the
District of Utah
January 30, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:99-cr-00260

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